

**Brookline Corporation d/b/a Hi Fi Buys and Richard Nussbaum. Case 22-CA-10136**

September 14, 1981

**DECISION AND ORDER**

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

On April 30, 1981, Administrative Law Judge Raymond P. Green issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> of the Administrative Law Judge and to adopt his recommended Order.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Brookline Corporation d/b/a Hi Fi Buys, Trenton, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

<sup>1</sup> The General Counsel has excepted to certain credibility findings made by the administrative law judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>2</sup> In concluding that Janice Abrahams' second discharge was not in violation of the Act, the Administrative Law Judge found that the discharge of Abrahams was not due to her intervening concerted activity. We find it unnecessary to pass on this finding, inasmuch as the finding that Abrahams was a supervisor within the meaning of Sec. 2(11) of the Act is sufficient to support the Administrative Law Judge's dismissal of that portion of the complaint.

**DECISION**

**STATEMENT OF THE CASE**

RAYMOND P. GREEN, Administrative Law Judge: This case was heard before me in Newark, New Jersey, on February 23, 1981. The complaint in this case was issued on August 22, 1980, by the Regional Director for Region 22 based on a charge filed by Richard Nussbaum on July 8, 1980.<sup>1</sup> In substance, the complaint alleges that, on July

1, the Respondent discharged employees Janice Abrahams, Richard Nussbaum, Bruce Abrahams, Lee Paixo, and David Kimbrough because they "concertedly complained to Respondent regarding the wages, hours and working conditions of Respondent's employees." In addition, the complaint alleges that, on or about June 30, the Respondent interrogated an employee about the employees' protected concerted activities.

The Respondent asserts, in essence, that it discharged Janice and Bruce Abrahams prior to the concerted activity, that the other employees involved were essentially interested in the rehire of Janice Abrahams, and that they quit their employment when the Respondent refused to retract its decision to discharge her. The Respondent also asserts that, as a store manager, Janice Abrahams was employed in a supervisory capacity.

In relation to this case, it is noted that all parties agreed that Bruce Abrahams was told that he was discharged on June 27 and that Janice Abrahams was notified of her discharge on June 29. In both instances, it is conceded by the General Counsel that the discharges, at those times, were not motivated by any discriminatory reasons and therefore were not violative of the Act. The General Counsel nevertheless asserts that, as a result of the concerted action by the employees, the Respondent rehired these two employees on June 30 and thereafter redischarged them on July 1 because of this concerted action.

Upon the entire record, including my observation of the demeanor of the witnesses and after reviewing the briefs, I make the following:

**FINDINGS OF FACT**

**I. JURISDICTION**

It is conceded that the Respondent is a Massachusetts corporation which operates retail stores throughout Massachusetts, New Jersey, and Pennsylvania, including the stores involved herein which are located in Princeton and Trenton, New Jersey. It also is admitted that the Respondent's gross sales of audio and related equipment for the past year exceeded \$500,000 and that it sold and shipped from its Massachusetts facilities products, goods, and materials valued in excess of \$5,000 which were shipped directly to points located outside the State of Massachusetts. I therefore conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It also was agreed and I find that Robert Lockwood, Respondent's president, and Jim Hardy, its district manager, have been at all times material herein supervisors within the meaning of Section 2(11) of the Act.

**II. THE ALLEGED UNFAIR LABOR PRACTICES**

The two stores involved herein were part of a group of 10 stores in New Jersey and Pennsylvania which were acquired by the Respondent from another company which was in bankruptcy proceedings. In connection with the acquisition, the Company hired a number of people including Janice Abrahams who was appointed as the store manager of the Princeton and Trenton stores

<sup>1</sup> Unless otherwise indicated, all dates are in 1980.

which are about 6 minutes distant from each other. She, in turn, was instructed to assemble a sales staff for these stores as quickly as possible, which she did by contacting a group of people with whom she was friendly. These people were thereafter hired by the Company basically on her recommendation and without further screening or interviewing.

According to Abrahams she continued to be the manager of the two stores for the first month of their operation, after which she managed only the Princeton store, which in June was manned by three sales people plus herself. In June all the stores in the New Jersey and Pennsylvania, areas were supervised by Hardy as the district manager and a man named Mark Leotta who had supervisory responsibilities over the two stores in question. In relation to the duties of the store managers, the Respondent offered credible evidence that their authority included the power to hire and fire. Also, the evidence discloses that the store managers are responsible for the general operations of their stores, including the training of all store personnel and the scheduling of their hours of employment. Additionally, the store managers are authorized to issue warnings to employees and are responsible for evaluating the performance of each employee. Accordingly, it is concluded that Janice Abrahams, as a store manager, was a supervisor within the meaning of Section 2(11) of the Act.

In June, after Hardy was promoted to district manager, he embarked on a program to assess the performance of the stores under his supervision. As part of his review, he assessed, *inter alia*, the relationship between each store's sales and its payroll expenses. As a result of this review, a sales employee at the Princeton store, Lisa Crites, was dismissed. Also on June 27, Bruce Abrahams was notified by Mark Leotta that he was terminated as of Monday, June 30. It appears, however, that the notification to Bruce Abrahams was made without Hardy's knowledge.

On June 28, Hardy met with Janice Abrahams and told her that, because payroll costs were still too high at the Princeton store, she would have to choose one of her other salespeople to be let go. He also told her that she would have to take a cut in pay or alternatively transfer to another store, if one were available, which could support her salary. Abrahams responded that she would not make a decision as to who to lay off and she also told Hardy that she would not accept a salary cut. At this point, Hardy told Abrahams to think it over and that he would call her on Sunday, June 29, for her decision. On Sunday, Hardy called Abrahams, asked for her decision, and, when she stated that she refused to take a salary cut, he told her that, as there were no stores available which could support her salary, she was fired. At or about the same time, Lee Paixo was transferred from the Princeton store to the Trenton store and a Rosenberg was transferred into the Princeton store as its manager.

On Monday morning, Janice Abrahams went to the Trenton store where she met with her brother, Bruce Abrahams, and Lee Paixo who were the only employees working there that day. They thereupon agreed to go see

Howard Pinkston<sup>2</sup> at his office in Feasterville, Pennsylvania, and they therefore closed the store and journeyed to his office that morning. While at Pinkston's office, the three employees protested the discharges of Bruce and Janice Abrahams and also pressed for improved wages for employees Lee Paixo and Richard Nussbaum. Pinkston's response was that he had no authority to deal with their demands, but that he would arrange a meeting between the employees and Hardy for that evening. At the close of the meeting, Pinkston asked Paixo and Abrahams to return and reopen the Trenton store and told the latter to forget about being laid off.

On Monday afternoon, after being informed of the visit to Pinkston's office and the concomitant closure of the Trenton store, Hardy visited the Princeton store and had a conversation with David Kimbrough. According to Kimbrough, Hardy said that he was having trouble with the people at the Trenton store and that he could not run a business with people acting together that way. He stated that Hardy asked him if he were with him or with the others and further asked if he were going to work the next day. Hardy concedes that he asked Kimbrough if he were with the Company or with the other employees.

On Monday evening, Hardy arrived at the Trenton store where Bruce Abrahams and Lee Paixo were present. At this meeting, the two employees presented their plan which proposed, *inter alia*, the rehiring of Bruce and Janice Abrahams and improvement in the wages of Paixo and Nussbaum. Also, Paixo told Hardy that he would quit unless the employees' plan was accepted. There is no dispute that, during this meeting, Hardy agreed to rehire Bruce and Janice Abrahams, although he states that his reasoning was based, in part, on the assertion by these employees that Rosenberg did not wish to work in the Princeton store.

According to Hardy, he later found out that Rosenberg was not unhappy about being transferred to the Princeton store and that he therefore changed his mind about rehiring Janice Abrahams. He also testified that he then assumed that, if he revoked his agreement to rehire Janice Abrahams, the other employees would leave their jobs. However, as to Bruce Abrahams, it appears from Hardy's testimony that he did not change his mind about rehiring this employee.

On Tuesday morning, July 1, Hardy visited the Trenton store where Richard Nussbaum, Lee Paixo, and Bruce Abrahams were present. Based on the record as a whole and my observation of the demeanor of the witnesses, the following is my conclusion as to what took place at that time. When Hardy entered, the first thing he said to the assembled employees was that he was going back to his original plan and that, if they did not want to stay because Janice Abrahams was not being re-

<sup>2</sup> Although the General Counsel argues that Pinkston was at this time a supervisor and agent of Respondent, the evidence does not prove this contention. At the time of these events, Pinkston was responsible for the computer and inventory functions, but did not have supervisory authority over any employees. Although it appears that he hired Lisa Crites to work in his office after she had been discharged from the Princeton store, that decision was quickly revoked by John Lockwood as being beyond Pinkston's authority and Crites was let go.

instated, they could leave and that they should hand in their keys. This statement then engendered a reluctance to turn in the keys unless an explanation was given. After some give and take, the keys were returned but, when Hardy still refused to give an explanation, the employees asked if this meant that they were fired. To this, Hardy's response was that they were acting too much like a union. At this point the employees left the store.

Although it is evident that, during the Tuesday meeting, Hardy never told any of the employees (except as to Janice Abrahams) that they were discharged, it also is evident that an ambiguous situation was created. Hardy testified that after the meeting he telephoned Rosenberg at the Princeton store with instructions to tell the three employees, when they arrived there, that they were not discharged. However, it does not appear from this record that this message was conveyed to these employees either on that day or at any time thereafter. Thus, from Hardy's own testimony it is apparent that he understood that the events which had transpired on that morning could reasonably have led Nussbaum, Paixo, and Bruce Abrahams to believe that they were discharged, an impression which was never corrected by the Company. There is, of course, no ambiguity as to the fact that Janice Abrahams was discharged.

Also, on Tuesday afternoon Hardy called David Kimbrough at the Princeton store. In this conversation, Hardy asked Kimbrough if he was going to stay at work or leave with the other employees. When Kimbrough stated that he did not know what he was going to do because he had heard that Janice Abrahams had been fired again, Hardy told him that, since he could not make up his mind, he would call Kimbrough back to find out "where it was at." Hardy did not call back and Kimbrough decided that he too would leave the store because he had previously agreed with Janice Abrahams that, if either were discharged, the other would quit. Thereafter, sometime in July, Hardy called Kimbrough and asked if he wanted to come back to work. This offer was declined.

### III. CONCLUDING FINDINGS

There is no doubt in my mind that, when employees of the Company concertedly protested the discharge of Bruce Abrahams and also sought improvements in their wages and hours, they were engaged in protected concerted activities within the meaning of Section 7 of the Act. *N.L.R.B. v. Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962); *United Merchants and Manufacturers, Inc. v. N.L.R.B.*, 554 F.2d 1276 (4th Cir. 1977); *Auto-Truck Federal Credit Union*, 232 NLRB 1024 (1977); *James R. McCaffey and Edward A. Cook, a partnership, d/b/a ABC Concrete Company*, 233 NLRB 1298, 1304 (1977).<sup>3</sup> It also is concluded that, by July 1, Hardy believed that all of the employees at both stores including Nussbaum and Kimbrough, but except for Rosenberg, were involved together in the concerted action and would leave the stores if their demands were not met.

<sup>3</sup> It therefore is not necessary to decide whether the concerted protest, insofar as it related to the discharge of Janice Abrahams, was protected by Sec. 7 of the Act.

Therefore, the fact that Nussbaum and Kimbrough did not directly participate in the protest on Monday, June 30, is not really relevant to my ultimate conclusions in this case. For if they were discharged because the Employer believed, even mistakenly, that they were engaged in protected concerted activity, such discharges would be unlawful. The more difficult question here is whether four of the five employees involved herein were in fact discharged and if so were they all discharged for discriminatory reasons.

The evidence discloses that Bruce and Janice Abrahams were discharged, respectively, on June 27 and 29. Further, their discharges, at that time, were concededly not unlawful as they were motivated by legitimate business reasons. It also is established that following these discharges Hardy had a discussion with Bruce Abrahams and Lee Paixo on the evening of June 30 in which he was told of the employees' demands and where he agreed to rehire Bruce and Janice Abrahams.

It nevertheless is apparent that, when Hardy arrived at the Trenton store on Tuesday morning, he had again changed his mind, at least as to Janice Abrahams. This was manifested in his initial statements to the employees present (Nussbaum, Bruce Abrahams, and Paixo) when he told them that he had decided to go back to his original plan. It further is evident that, in anticipation of a cessation of work by these three employees,<sup>4</sup> Hardy asked for their keys. When the employees asked Hardy if they were fired, Hardy's response was that they were acting too much like a union.

With respect to Janice Abrahams it has already been noted that her initial discharge on June 29 was for legitimate business reasons. Thus, when Hardy announced that he was going back to his original plan, this statement was indicative of his intention to return to the status quo prior to the concerted activity and does not, at least in my opinion, give rise to the inference that his decision on Tuesday morning to redischARGE Abrahams was motivated by the intervening concerted activity. That is, although the concerted activity on Monday led Hardy to retract his initial nondiscriminatory discharge of Abrahams, this does not compel the conclusion that he was thereafter precluded from again changing his mind, if his change of mind did not encompass discriminatory considerations. As it is my opinion that Hardy decided to return to his original plan of discharging Abrahams, which was itself motivated by legitimate reasons, I do not conclude that the reaffirmance of her discharge on July 1 violated the Act as I do not believe that this second decision was motivated by discriminatory reasons.

As to Bruce Abrahams, Nussbaum, and Paixo, the situation is somewhat different. Specifically as to Abrahams, although I have concluded that on Tuesday morning Hardy had decided, for nondiscriminatory reasons, to reaffirm his original decision to discharge Abrahams, it is my opinion that he had not changed his mind regarding

<sup>4</sup> Although there was some testimony that Nussbaum was, at this time, a co-manager of the Trenton store, it was not established in this record that he exercised the powers of a store manager and the Respondent did not assert that he was a supervisor.

his agreement to rehire Abrahams. The next question, therefore, is whether by his actions or words Hardy discharged Bruce Abrahams, Richard Nussbaum, and Lee Paixo on Tuesday morning.

As I have noted above, it certainly is plausible that, when Hardy announced his decision to go back to his original plan, he had good reasons to believe that the employees would leave the store. Therefore, from his point of view, he would have had reason to ask for the keys without intending to discharge the employees present. On the other hand it is also plausible that these employees could reasonably have construed Hardy's statements as indicating his intent to discharge them. Thus, it is possible that each side hearing the same words could have reached different perceptions of what was intended. Nevertheless, I am of the opinion that this ambiguity was effectively resolved when the employees asked Hardy if they were discharged and he replied that they were acting too much like a union instead of saying no. Indeed Hardy's own testimony indicates that he realized that he may have given these three employees the impression that they were discharged because he states that, after they left the store, he made a call to Rosenberg at the Princeton store telling him to notify the employees in question that they were not discharged. Unfortunately for the Respondent, there is no evidence in this record that this message was transmitted. Therefore, based on the record as a whole, I conclude that on Tuesday, July 1, the Respondent discharged employees Bruce Abrahams, Richard Nussbaum, and Lee Paixo. *Pennypower Shopping News Inc.*, 253 NLRB 85 (1980).<sup>5</sup> It also is concluded that the motivation for these discharges was due to the Employer's belief that the employees in question were involved in protected concerted activity. Accordingly, I find that by discharging these employees the Respondent violated Section 8(a)(1) of the Act.

In the case of David Kimbrough, however, it is concluded that the General Counsel has not made out a *prima facie* showing that he was discharged at any time. Rather, it appears from the evidence that he left the Company of his own accord pursuant to a preplanned agreement with Janice Abrahams to quit if she were terminated. Accordingly, I find that the complaint, insofar as it alleges that he was unlawfully discharged, should be dismissed.

The final issue in this case is whether the Respondent illegally interrogated Kimbrough. On this subject, the facts which are not in substantial dispute establish that on Monday afternoon, June 30, Hardy having been faced with the closing of the Trenton store by the employees that morning, asked Kimbrough if he was with the other employees or with him and if he was going to work the next day. If the question were merely an attempt to ascertain whether Kimbrough also intended to leave his store it would not, in these circumstances, be unlawful.

<sup>5</sup> In *Pennypower Shopping News, Inc.*, *supra*, the Board concluded that where "a climate of ambiguity and confusion which reasonably caused the employees to believe that they had been discharged, or at the very least, that their employment status was questionable because of their strike activity," the "burden of the results of that ambiguity must fall on Respondent." The Board also concluded that, in such circumstances, the employees were under no obligation to seek reinstatement.

*Mosher Steel Company*, 220 NLRB 336 (1975); *Roadhome Construction Corp.*, 170 NLRB 668 (1968). However, the question was broader than this, and would reasonably have been construed as an interrogation of Kimbrough's position on the concerted protest by the others. Accordingly, it is my opinion that the interrogation of Kimbrough violated Section 8(a)(1) of the Act.

Based on the foregoing, I make the following:

#### CONCLUSIONS OF LAW

1. The Respondent, Brookline Corporation d/b/a Hi Fi Buys, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, by interrogating an employee regarding his support for the concerted protected activities of other of the Respondent's employees, violated Section 8(a)(1) of the Act.

3. The Respondent, by discharging its employees Bruce Abrahams, Richard Nussbaum, and Lee Paixo because of their protected concerted activities, violated Section 8(a)(1) of the Act.

4. Except to the extent heretofore found, the Respondent has not violated the Act in any other manner.

5. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having concluded that Bruce Abrahams, Richard Nussbaum, and Lee Paixo were unlawfully discharged on July 1, 1980, I shall recommend that the Respondent offer them immediate and full reinstatement to their former jobs and make them whole for any losses they may have suffered from that date. Backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). Additionally, it is recommended that Respondent post the attached notice.

Based on the above findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>6</sup>

The Respondent, Brookline Corporation d/b/a Hi Fi Buys, Trenton, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or causing employees to reasonably believe they were discharged for engaging in concerted protected activity.

(b) Interrogating employees regarding their sympathies or support for protected concerted activities.

<sup>6</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action in order to effectuate the policies of the Act:

(a) Offer Bruce Abrahams, Richard Nussbaum, and Lee Paixo immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed,<sup>7</sup> and make them whole for any loss of earnings they may have suffered as a result of the discrimination practiced against them, plus interest.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Trenton, New Jersey, and Princeton, New Jersey, stores copies of the attached notice marked "Appendix."<sup>8</sup> Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Rea-

sonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT discharge employees or cause employees to believe that they were discharged because of their protected concerted activities.

WE WILL NOT interrogate our employees about their sympathies or support for protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Bruce Abrahams, Richard Nussbaum and Lee Paixo immediate and full reinstatement to their former positions or, if their former positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make the aforesaid employees whole for any loss of earnings they may have suffered as a result of the discrimination practiced against them, with interest.

<sup>7</sup> In view of the fact that Paixo is currently serving in the United States Navy, if this Order becomes effective before he has left the service, an offer of reinstatement shall be made to him effective upon completion of his present tour of duty.

<sup>8</sup> In the event this Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

BROOKLINE CORPORATION D/B/A HI FI  
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